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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CANTER & ASSOCIATES, LLC, and
LAUREATE EDUCATION, INC.,

Plaintiffs.

v.

TEACHSCAPE, INC.,

Defendant.

Case No. C 07-3225 RS

**DEFENDANT TEACHSCAPE, INC.'S
NOTICE OF MOTION AND MOTION
TO DISMISS AND/OR STRIKE
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

**CONCURRENTLY FILED
HEREWITH:**

**REQUEST FOR JUDICIAL NOTICE
AND DECLARATION OF GAYLE M.
ATHANACIO**

**Date: September 26, 2007
Time: 9:30 a.m.
Courtroom: 4, Fifth Floor
Honorable Richard Seeborg**

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on September 26, 2007, at 9:30 a.m., or as soon thereafter as counsel may be heard, in Courtroom 4 of the United States District Court for the Northern District of California, located at 280 S. 1st Street, San Jose, California, Defendant Teachscape, Inc. (“Teachscape”) will, and hereby does, move, pursuant to Federal Rule of Civil Procedure 12(b)(6) and 12(f) to dismiss with prejudice and/or strike Plaintiffs Canter & Associates, LLC (“Canter”) and Laureate Education, Inc.’s (“Laureate”) (collectively, “Plaintiffs”) Complaint For Injunctive Relief And Damages (“Cmplt.”). Specifically, Teachscape moves for an Order dismissing with prejudice and/or striking the following claims made against Teachscape for failure to state a claim:

- First Claim for Relief for Misappropriation of Trade Secrets (Civil Code section 3426)
- Second Claim for Relief for Intentional Interference with Prospective Advantage under California Law
- Third Claim for Relief for Intentional Interference with Contract under California Law
- Fourth Claim for Relief for Violation of Cal. Bus & Prof. Code § 17500 et seq. (False or Misleading Advertising)
- Fifth Claim for Relief for Violation of Cal. Bus & Prof. Code § 17200 et seq. (Unfair Competition Law)
- Sixth Cause of Action for Violation of Lanham Act § 43(a), 15 U.S.C. § 1125 (a) (False or Misleading Advertising)
- Seventh Cause of Action for Copyright Infringement (17 U.S.C. § 501)

Teachscape's motion will be and is based upon this Notice, the Memorandum of Points and Authorities, Declaration of Gayle M. Athanacio, and Request for Judicial Notice filed herewith, and all pleadings, records and documents on file herein, and such additional evidence and argument as may be properly introduced in support of the motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In this action, Plaintiff Laureate, a self-professed “leader in the post-secondary education market [which] offers online degree programs throughout the United States,” and its subsidiary, Canter, seek injunctive relief, damages, restitution and attorneys’ fees against defendant Teachscape, a competitor in the higher education market. Asserting claims for copyright infringement, false advertising, interference with contract and prospective advantage, and unfair competition, Plaintiffs’ Complaint, while replete with hyperbole and baseless attacks against Teachscape, contains no substantive allegations that support any of its claims.

Indeed, a careful reading of the Complaint makes it abundantly clear that the only alleged *facts* underlying *all* of Plaintiffs' claims—including a specious claim for 40 alleged acts of copyright infringement—relate solely to two alleged series of events:

1. In 2004, Teachscape hired or contracted with certain employees or independent contractors who previously worked for Canter (Cmplt., ¶ 7); and
2. In or about September 2006, Teachscape announced its plan to partner with Marygrove College to provide Marygrove's graduate degree programs in 2007 when Canter allegedly had a preexisting relationship with Marygrove College (Cmplt. ¶¶ 15-17).

These manifestly innocuous “facts” reflect no wrongdoing by Teachscape and fail to sustain any of Plaintiffs’ claims. Plaintiffs’ ex-employees and consultants admittedly had every right to work for Teachscape, and Plaintiffs do not legitimately allege any conduct by Teachscape that constitutes actionable wrongdoing in entering into a relationship with Marygrove College and conducting its business in an open market.

Plaintiffs' federal claims for alleged violations of the United States Copyright Act and the Lanham Act — the only bases for subject matter jurisdiction¹—do not withstand even minimal scrutiny. Plaintiffs improperly lump into one conclusory claim an assertion that Teachscape willfully infringed 40 separate works (comprised of audiovisual and online teaching

¹ There is no diversity jurisdiction and the state claims should be dismissed in the absence of federal question jurisdiction.

1 course materials) registered for copyright protection in April 2007. Plaintiffs undeniably did not
2 (nor can they) allege the key element of a *single* copyright claim— substantial similarity of
3 protectable expression between content in a specific work of Teachscape’s and content in a
4 specific work of Plaintiffs. Their purported justification for this wholesale failure to state a valid
5 claim is their conclusory assertion that Teachscape “unreasonably” denied them access “to the
6 materials in dispute.” This allegation is demonstrably false and in all events, cannot justify their
7 filing of a copyright claim with no factual predicate. Neither case law nor common sense
8 support the proposition that a party may file a federal action alleging willful infringement based
9 on its mere *suspicion* that there is substantial similarity in some unidentified work of a
10 competitor. To the contrary, such action gives rise to sanctions under Federal Rule of Civil
11 Procedure 11.

12 Plaintiffs’ claim for false or misleading advertising under the Lanham Act (and
13 California statute) is predicated solely on the alleged advertisement of Marygrove’s degree
14 program offered in 2007 through Teachscape in which the program is apparently described as
15 “updated.” Yet, there is nothing actionable about the use of the single word “updated” in
16 Marygrove’s degree program advertisement.

17 Plaintiffs’ state law claims for misappropriation of trade secrets, unfair competition, and
18 wrongful interference with contract or prospective advantage are equally devoid of merit as the
19 properly pleaded “facts” and case law do not support these claims. Teachscape’s motion to
20 dismiss should be granted.

21 II. STATEMENT OF FACTS

22 A. Background Allegations Related To The Parties

23 Laureate alleges that it is “a leader in the post-secondary education market and offers
24 online degree programs throughout the United States and internationally” through partnerships
25 with university and colleges. Canter is a subsidiary of Laureate providing such degree programs
26 and graduate courses. Cmplt., ¶ 6. One of Canter’s partners is Marygrove College
27 (“Marygrove”), through which it offered a Marygrove master’s degree program with a focus on
28 Curriculum, Instruction and Assessment (“CIA”). *Id.* at ¶ 14.

1 According to the Complaint, in April 2004, Teachscape began hiring, or contracting with,
2 twelve former Canter employees. *Id.*, ¶ 7. Some of these former employees were supposedly
3 long term key employees who helped develop Canter's education master's degree programs and
4 who had access to Canter's alleged trade secrets and confidential information. *Id.*, ¶ 9. Canter
5 does not suggest that Teachscape wrongfully solicited or hired any of these employees.

6 Canter alleges that it invested years of market research and substantial financial resources
7 into developing its business plan and knowledge of the industry to create and market degree
8 programs to create relationships with master's degree university partners. *Id.*, ¶ 10. However,
9 the only relationship Canter identifies is with Marygrove College: At some unspecified time,
10 Canter allegedly entered into a confidential agreement with Marygrove College, whereby Canter
11 would promote and develop Marygrove's CIA degree program, and which also allegedly
12 guaranteed Canter the right of first refusal if Marygrove decided to offer additional degree
13 programs (including Math and Reading programs). *Id.*, ¶ 51. No other university "partnerships"
14 are identified in the Complaint.

15 Canter alleges that "overnight" Teachscape was able to enter Canter's market. *Id.*, ¶ 11.
16 However, while Canter suggests that Teachscape began negotiating agreements to offer
17 competing programs to Canter's "most profitable customers," (none of which are identified),
18 other than Marygrove, there is no allegation that Teachscape actually entered into any contract
19 with any Canter customer. Critically, Canter's customers are publicly known universities and
20 colleges, reflected on Plaintiffs' website pages. *See* Request for Judicial Notice ("RFJN"), Exhs.
21 C, E.

22 As to Marygrove, Canter admits that the only allegedly competing courses ever offered by
23 Teachscape were to begin in 2007. Specifically, Canter alleges that in September 2006, it
24 learned that Teachscape would be offering a CIA program, and Math and Reading degrees, in
25 partnership with Marygrove in 2007. *Id.*, ¶¶ 14-16. Tellingly, Canter claims that when it
26 contacted Teachscape (and Marygrove) about the Marygrove programs Teachscape intended to
27 offer, Teachscape did not deny its relationship with Marygrove; rather, Teachscape "claimed
28 that it was unaware that its intended offerings in any way interfered with any contractual

1 obligations between Canter and Marygrove.” *Id.*, ¶ 20. Canter nonetheless asserts that
 2 *Teachscape* must have known of the precise terms of Canter/Marygrove contracts “*by virtue of*
 3 *the Canter Former Employees’ employment with Canter*”. *Id.*, ¶ 52. Canter admits that after
 4 being apprised of Canter’s claim that the CIA offering was contrary to Marygrove’s contract
 5 with Canter, Teachscape withdrew its CIA program for 2007. *Id.*, ¶ 21.

6 In April 2007, Plaintiffs obtained forty copyright registrations with the U.S. Copyright
 7 Office. *Id.*, ¶ 24; RFJN, Ex. A. Each of these registrations are for derivative works (newer
 8 editions of previous works).

9 **B. Plaintiffs’ Claims**

10 In their Complaint, Plaintiffs allege seven causes of action. In its first cause of action for
 11 misappropriation of trade secret (violation of California Civil Code § 3426), Canter alleges that
 12 it was in possession of trade secrets which consisted of “among other things, a proprietary
 13 methodology for identifying appropriate markets for its products, information regarding market
 14 segmentation, design of distance learning degree programs and methods for their accreditation,
 15 enrollment systems, and specific customer contacts and preferences.” Cmplt., ¶ 29. Canter
 16 alleges these “trade secrets” had economic value to Canter which while made known to its
 17 former employees, were subject to confidentiality agreements. *Id.*, ¶ 30. Canter then alleges in
 18 conclusory fashion that Teachscape misappropriated these trade secrets by taking Canter’s
 19 proprietary knowledge about lucrative markets and using that knowledge without permission to
 20 market Teachscape’s competing services to Canter’s current educational partners. *Id.*, ¶ 32. No
 21 particular marketing efforts or current educational partners are identified, except to the extent
 22 that Canter incorporates by reference its allegations about Teachscape’s relationship and alleged
 23 marketing of Marygrove’s degree program in September 2006. *See id.*, ¶¶ 29-32. Canter claims
 24 it will suffer “irreparable harm” if Teachscape, as well as all its employees and persons acting in
 25 concert with them, are not enjoined. *Id.*, ¶ 34. Canter claims Teachscape’s conduct was so
 26 willful and malicious, that an award of punitive damages and attorneys’ fees is appropriate. *Id.*,
 27 ¶ 36-37.

28 In its second claim, Canter accuses Teachscape of intentionally interfering with its

1 prospective economic relationships “with a number of educational institutions.” *Id.*, ¶ 39. Canter
 2 suggests that Teachscape “knew or had reason to know of these relationships with its partners”
 3 and in some unspecified manner used confidential information to actually disrupt these
 4 relationships. *Id.*, ¶¶ 39-43. Canter does not identify any third party with which Canter had such
 5 a relationship, or any act by Teachscape with any of Canter’s unidentified prospective
 6 relationships, except to suggest that Teachscape induced at least one of Canter’s existing
 7 partners to reject a Canter program and to replace it with a “substantially similar” program
 8 offered by Teachscape. *Id.*, ¶¶ 39-41. No particular partner or “substantially similar program”
 9 is identified, and while the Complaint does mention Marygrove’s degree program, Plaintiffs
 10 admit that they have never seen Teachscape’s course materials (*id.*, ¶ 26) and have no idea if the
 11 programs are actually similar at all.

12 Cantor’s third claim asserts that Teachscape intentionally interfered with the Canter/
 13 Marygrove contract. Premised on the notion that Teachscape “knew of these contracts” by
 14 virtue of Teachscape having employed some of Canter’s former employees, Canter alleges that
 15 Teachscape wrongfully interfered with the Canter/Marygrove contract² as Canter believes
 16 Marygrove does not intend to renew its contract for the provision of the CIA degree with Canter,
 17 and/or that Teachscape induced Marygrove to attach (unstated) conditions to Marygrove’s Math
 18 and Reading degree programs that would be “unacceptable” to Canter such that Canter would
 19 not want to provide that program for Marygrove. *Id.*, ¶¶ 51-60. Canter also alleges that
 20 Teachscape falsely advertised its version of Marygrove’s CIA program as “updated.” *Id.*, ¶¶ 56-
 21 57. Canter does not allege any *facts* that identify any act by Teachscape designed to induce or
 22 disrupt any contract, or how exactly Canter suffered any damages.

23 Canter also brings claims for allegedly misleading advertising, both under California
 24 Business & Professions Code section 17500(fourth claim) and the Lanham Act (sixth claim for
 25 relief). Canter, however, does not specify any particular advertisement(s) that allegedly are

27
 28 ² Canter refers “a contract” and “contracts” with Marygrove. Teachscape cannot discern from
 the complaint whether a single or multiple contracts with Marygrove were allegedly interfered
 with.

1 misleading. Rather, it generally references alleged advertising of Marygrove's CIA degree
2 program offering by Teachscape as "updated." *Id.*, ¶¶ 65-66. This single word alone is alleged
3 to give rise to liability as it supposedly implied a "long-term successful partnership with
4 Marygrove" and falsely suggests the Teachscape courses offered at Marygrove were "updated
5 courses" when in actuality the prior courses were previously prepared by Canter. *Id.*, ¶ 66.
6 Although Canter acknowledges the CIA course offering was withdrawn, it seeks "restitution for
7 the benefits improperly garnered by Teachscape" under the California statute and unspecified
8 damages under the Lanham Act. *Id.*, ¶¶ 68, 81.

9 Laureate and Canter both bring claims alleging the acts (such as they are) of misuse of
10 Canter's confidential information to further develop Teachscape's competing business and that
11 its "advertising" constitutes unfair competition in violation of Cal. Bus. & Prof. Code § 17200,
12 the Unfair Competition Law ("UCL"). *Id.*, ¶ 70. Canter additionally claims these practices are
13 "immoral and unscrupulous" and have been undertaken in violation of unstated policies
14 established in the California Civil Code and Labor Code. *Id.*, ¶ 71. Plaintiffs claim they are
15 entitled to "restitution of the benefit improperly garnered by Teachscape", disgorgement of all
16 "ill-gotten profits" and an injunction. *Id.*, ¶¶ 73-74.

17 Laureate asserts the seventh claim for relief for Copyright Infringement, alleging on
18 information and belief that "at least as of January 2007, Teachscape has deliberately and
19 willfully infringed" 40 copyrighted works identified in the Complaint. *Id.*, ¶ 84. Laureate
20 asserts Teachscape copied Canter's course materials. However, Laureate admits it has no facts
21 or evidence to support or define the copyright claim. *Id.*, ¶¶ 26, 85. Indeed, there is no
22 reference to a specific passage or portion of any of the 40 copyrights (all for derivative works)
23 listed in the Complaint, nor any reference to any specific Teachscape course. Rather, it asserts
24 that Teachscape "refuse[d] to provide access to the materials at issue despite demand" such that
25 it has a "reasonable basis" to "infer" Teachscape's deliberate and willful infringement. *Id.*, ¶
26 85. Laureate, however, admits an exchange of materials was offered by Teachscape (and/or that
27 the materials may be obtained directly online from Marygrove), but suggests that Teachscape
28 placed "unreasonable conditions" on an exchange of materials. *Id.*, ¶¶ 26, 27, 85.

1 **III. LEGAL STANDARDS**

2 A complaint may be dismissed for failure to state a claim upon which relief can be
 3 granted. Fed. R. Civ. P. 12(b)(6). Dismissal may be based on either the lack of a cognizable
 4 legal theory or the absence of sufficient facts alleged under a cognizable theory. *Facebook, Inc.*
 5 *v. ConnectU LLC*, 489 F. Supp. 2d 1087 (N.D. Cal. 2007). In considering a motion to dismiss,
 6 “the court need not accept as true conclusory allegations or legal characterizations cast in the
 7 form of factual allegations.” *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F.Supp. 1303,
 8 1307 (N.D. Cal. 1997) (citation omitted).

9 Thus, while the complaint is construed in the light most favorable to plaintiff and its
 10 allegations must be taken as true, “a plaintiff’s obligation to provide the ‘grounds’ of his
 11 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of
 12 the elements of a cause of action will not do.... Factual allegations must be enough to raise a
 13 right to relief above the speculative level... [T]he pleading must contain something more ... than
 14 ... a statement of facts that merely creates a *suspicion* [of] a legally cognizable right of action.”
 15 *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (internal citations omitted)
 16 (emphasis added). “[C]onclusory allegations of law and unwarranted inferences,’ however, ‘are
 17 insufficient to defeat a motion to dismiss for failure to state a claim.”” *Facebook, Inc.*, 489 F.
 18 Supp. 2d at 1090 (quoting *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir.
 19 1996).

20 As the Supreme Court recently observed, “something beyond the mere possibility of loss
 21 causation must be alleged, lest a plaintiff with ““a largely groundless claim”” be allowed to
 22 ““take up the time of a number of other people, with the right to do so representing an *in
terrorem* increment of the settlement value.”” *Twombly*, 127 S. Ct. at 1966 (quoting *Blue Chip
Stamps v. Manor Drug Stores*, 421 U.S. 723, 741, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975)). As
 23 the Court observed, “a district court must retain the power to insist upon some specificity in
 24 pleading before allowing a potentially massive factual controversy to proceed.” *Id.* at 1967.

25 Further, Federal Rule of Civil Procedure 12 (f) provides that a court “may order stricken
 26 from any pleading any insufficient . . . redundant, immaterial, impertinent, or scandalous

1 matter.” Fed. R. Civ. P. 12(f). A motion to strike is the appropriate means of eliminating,
 2 among other things, an improper claim for relief. *Safeway Stores, Inc. v. National Union Fire*
 3 *Ins. Co. of Pittsburgh*, 64 F.3d 1282, 1290 (9th Cir. 1995).

4 **IV. ARGUMENT**

5 **A. Laureate’s Copyright Claim Must Be Dismissed.**

6 Any pleading asserting a copyright infringement claim must satisfy Federal Rule of Civil
 7 Procedure 8(a) and broad legal conclusions do not sufficiently state a claim of copyright
 8 infringement. *See, e.g., Brown v. Adidas Int.*, 938 F. Supp. 628, 635-36 (S.D. Cal. 1998).

9 Moreover, a complaint must allege “*by what acts* during what time the defendant
 10 infringed the copyright.” *Tom Kelley Studios Inc. v. International Collectors Society*, 1997 WL
 11 598461 at *1 (S.D.N.Y. 1997) (emphasis added) (citations omitted) (“complaint fails to satisfy
 12 ...minimum pleading requirements.... there are no allegations of specific *acts* of infringement
 13 with respect to *specific* copyrights owned by plaintiffs.”) *See also Borden & Barton Enter., Inc.*
 14 *v. Warner Bros. Broadcasting Corp.*, 222 P.2d 463 (Cal. Ct. App. 1950) (plaintiff failed to state
 15 a claim as he did not, *inter alia*, identify the exact similarity between plaintiff’s and defendants’
 16 radio shows or what portions of plaintiff’s show were copied by defendants); *Livnat v. Lavi*,
 17 1997 WL 566097 at *2 (S.D.N.Y. 1997) (“In a copyright claim the plaintiff must, at minimum,
 18 allege by what specific acts the defendant infringed the copyright....The allegedly infringing
 19 acts committed by the [] Defendants must be set forth with sufficient specificity to permit an
 20 adequate opportunity for defense”); *Newborn v. Yahoo! Inc.*, 391 F.Supp.2d 181, 187, 189
 21 (D.D.C. 2005)(“Although Rule 8 requires only a short plain statement, this statement must be
 22 sufficient to provide the defendants notice of the claims alleged against them.”).

23 While claiming forty (or more) acts of copyright infringement, Laureate does not and
 24 cannot identify one specific work or part of a work by Teachscape that contains any infringing
 25 content relative to any of these forty works. Laureate’s bold allegation that Teachscape
 26 “deliberately and willfully infringed Laureate’s copyrights in the Audiovisual and Online Course
 27 Materials by making copies and derivative works therefrom” (Cmplt., ¶ 84) is not supported by
 28 any *facts* describing any allegedly infringing act by Teachscape whatsoever. There is no

1 reference to any specific content whatsoever, and no identification of the manner of any
 2 infringement save for Laureate's conclusory assertions. Notably, the Complaint contains no
 3 factual description of any violation by Teachscape of any of the five exclusive rights of a
 4 copyright holder found in Section 106 of the Copyright Act. Clearly, Teachscape cannot
 5 evaluate Laureate's infringement claim on 40 works when Laureate itself does not (as it cannot)
 6 provide any information as to what exactly is the allegedly infringed upon and infringing
 7 material.

8 Laureate tacitly recognizes its wholesale failure to state a claim when it alleges it has met
 9 its obligation to conduct a reasonable inquiry into its copyright claim because Teachscape
 10 allegedly insisted upon "unreasonable conditions" to a review of any allegedly offending
 11 materials (Cmplt., ¶ 12) and that such alleged refusal provided Laureate with a "reasonable basis
 12 to infer that Teachscape is deliberately and willfully infringing on Laureate's registered
 13 copyrights." (Cmplt., ¶ 85). To the contrary, Teachscape was willing to engage in an exchange
 14 of any allegedly infringing material. Teachscape asked Laureate to identify the courses it
 15 suspected (without basis) were "copied" and proposed an "apples to apples" comparison of the
 16 parties' final course materials by counsel. *See Declaration of Gayle M. Athanacio ("Athanacio*
 17 *Decl.", Exs. B, C, E.)*³ Plaintiffs, in the process of hastily filing copyright applications for 40
 18 works for the first time, chose to ignore this offer, and instead filed this omnibus copyright
 19 infringement claim without basis. They compounded their frivolous filing by falsely alleging
 20 that they had no opportunity to view any of Teachscape's courses, and that the only way

21

22 ³ Documents such as these letters, which the Complaint relies upon for its copyright claim in
 23 paragraphs 26, 27, and 85, may be considered on a motion to dismiss. "[A] district court ruling
 24 on a motion to dismiss may consider a document the authenticity of which is not contested, and
 25 upon which the plaintiff's complaint necessarily relies." *Parrino v. FHP, Inc.*, 146 F.3d 699,
 26 705-06 (9th Cir. 1998). *See also Hazleton v. Alameida*, 358 F. Supp. 2d 926, 928 (C.D. Cal.
 27 2005) ("Even documents that are not physically attached to the complaint may be considered [on
 28 a motion to dismiss] if their authenticity is not contested and the complaint 'necessarily relies'
 on them.") (citations omitted). Should the Court not be inclined to consider the unquestionably
 authentic correspondence between Plaintiffs' and Defendant's counsel, the Court should then
 disregard the factually and legally conclusory allegations by Plaintiff that any conditions on an
 exchange were "unreasonable."

1 Plaintiffs could get the course materials was through a pretext it deemed inappropriate, *i.e.* by
 2 posing as a student and signing up for a Teachscape masters degree program. Cmplt., ¶ 26. Yet
 3 this course material is precisely the same final course material that Teachscape offered to
 4 exchange. *See* Athanacio Decl., Ex. E.

5 Fundamentally, Plaintiffs' copyright claim is based entirely and improperly on speculation
 6 and suspicion. Yet, a mere suspicion or belief that intellectual property is being infringed does
 7 not constitute a reasonable basis for filing a complaint. *See Christian v. Mattel, Inc.*, 286 F.3d
 8 1118 (9th Cir. 2002) (plaintiff's attorney's failure to investigate allegedly infringing copyright
 9 warranted Rule 11 sanctions). For example, in *Judin v. U.S.*, 110 F.3d 780 (Fed. Cir. 1997), the
 10 court held the failure of patentee's attorney to make a reasonable inquiry before filing its
 11 complaint warranted Rule 11 sanctions.⁴ *See also Eon-Net, L.P. v. Flagstar Bancorp, Inc.*, 239
 12 F.R.D. 609, 614-15 (W.D. Wash. 2006) (finding an inadequate pre-filing inquiry because the
 13 plaintiff "brought suit without even deciding what products or functionality infringed...[i]t is
 14 implicit that identification of the accused device is a necessary prerequisite to determining
 15 infringement"); *Refac Int'l v. Hitachi, Ltd.*, 141 F.R.D. 281, 286-88 (C.D. Cal. 1991) (plaintiff's
 16 failure to examine or reverse engineer accused products prior to complaint warranted Rule 11
 17 sanctions).

18 No doubt recognizing its vulnerability on this point, in its complaint, Laureate cites two
 19 cases to suggest its filing does not violate Rule 11. Cmplt., ¶ 27. Neither case—both of which
 20 are patent, not copyright cases—justifies the filing of Laureate's copyright claim here or
 21 insulates Plaintiffs from exposure under Rule 11. In *Hoffman-LaRoche Inc. v. Invamed Inc.*, 213
 22 F.3d 1359 (Fed. Cir. 2000), the plaintiff knew (and could allege with certainty) that the
 23 defendant was selling a generic version of a drug it was manufacturing. It had a sample of the
 24 drug but did not have access to the manufacturing process. The plaintiff was compelled
 25 ultimately to dismiss its infringement claim, and the defendant thereafter sought Rule 11

26
 27 ⁴ The plaintiff initiated the patent infringement claim against the Postal Service for an optical
 28 scanning device, without having actually examined the allegedly infringing device. The court
 held that the plaintiff could have been "much better informed before filing the complaint" and
 did not make the required effort to obtain the device.

1 sanctions. The court declined to issue sanctions because the defendant had “refused to disclose
2 the manufacturing process,” and the court could not “imagine what else [the plaintiffs] could
3 have done to obtain facts relating to [the defendant’s] alleged infringement of their process
4 patents.” *Id.* at 1363-1364. Similarly, in *Intamin v. Magnetar Tech. Corp.*, 483 F.3d 1328, 1338
5 (Fed. Cir. 2007), the *technology* of the patent—which would have required cutting open metal
6 casing on magnets, or doing chemical tests to investigate—“presented the patentee with
7 unreasonable obstacles to any effort to obtain a sample....” 483 F.3d at 1338.

8 These two cases provide no support for Laureate’s bold attempt to bypass its pleading
9 obligations. Laureate’s copyright claim does not involve a patent or any unique manufacturing
10 process—it involves written and audiovisual materials that consist of academic courses in the
11 English language. No good faith basis exists for Laureate’s filing of a copyright claim involving
12 forty separate works comprising what appears to be the totality of Laureate’s “Audio Visual and
13 Online Course Materials” (*see* Cmplt., ¶ 24) when it admits it has never even seen the allegedly
14 infringing material(s). The correspondence regarding the offered exchange of material alluded
15 to but not presented to the court by Laureate shows it had ample opportunity to conduct a
16 reasonable investigation into any suspected copyright claim, but instead hurriedly registered its
17 forty works with the U.S. Copyright Office (all registered on April 10, 2007) and filed this
18 action in bad faith.

19 **B. The Copyright Claim Relates Only To Derivative Works.**

20 Before filing suit for copyright infringement and statutory damages, a plaintiff must have
21 registered the allegedly infringed material with the U.S. Copyright Office. 17 U.S.C. § 411(a);
22 *S.O.S. Inc. v Payday, Inc.* 886 F.2d 1081, 1085 (9th Cir. 1989). As reflected on the registrations,
23 each of Laureate’s 40 works is a derivative work based upon an underlying work identified as
24 previously created but unregistered. The only material registered by each of these forty
25 registrations is the *new material* added to the “previously published edition.” A copyright in a
26 derivative work protects only the *additional original* contributions of the author of the latest
27 edition. It does not protect the original work. *See, e.g., Silverman v. CBS, Inc.*, 870 F.2d 40, 49
28 (2d Cir. 1989) (“[T]he fundamental copyright principle applicable to this case is that a copyright

affords protection only for original works of authorship and, consequently, copyrights in the derivative works secure protection only for the incremental additions of originality contributed by the authors of the derivative works").

There is no mention in the Complaint about the original editions, including any allegation of ownership thereof, and the infringement claim is not (and may not be) based upon the underlying unregistered works. The claim relates solely to some unspecified aspect of the newly added material in the 40 works, and the Complaint offers no information as to the difference between the newly added content versus the original content of any work.⁵

When one considers the complete lack of factual support for Laureate's copyright claim, its disingenuous attempt to suggest it could not review the suspected infringing material, and its failure to identify the differences relative to its derivative works, it is clear that Laureate is not seeking to protect any intellectual property but instead attempting to force Teachscape to suffer expense and unwarranted and burdensome discovery. This Court should reject Laureate's effort.

C. Plaintiffs' Lanham Act Claim Must Be Dismissed.

Under section 43(a) of the Lanham Act, an actionable claim for false advertising includes the following elements: (1) a false statement of fact in a commercial advertisement; (2) evidence that the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception must be material (*i.e.*, likely to influence potential customers); (4) evidence the defendant caused the statement to enter interstate commerce; and (5) proof of injury incurred by the plaintiff. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).

As courts may resolve whether a statement is actionable on a motion to dismiss (*Cook Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 245 (9th Cir. 1990)), a certain degree of detail must be pled:

While a Lanham Act claim is not subject to the strict pleading requirements of Rule 9 fraud claims, "the policies which underlie Rule 9's requirement that the

⁵ By failing to provide any notice of what material has been added to each of the forty works, there also is no way to assess what, if any, new material is protectible expression versus facts or ideas used in connection with academic courses on math and reading.

1 nature of an alleged misrepresentation be pleaded with specificity are equally
2 applicable to the type of misrepresentation claims presented in [a] Lanham Act
3 claim. In litigation in which one party is charged with making false statements,
4 it is important that the party charged be provided with sufficiently detailed
allegations regarding the nature of the alleged falsehoods to allow him to make
a proper defense.”

5 *In re Century 21-RE/MAX Real Estate Advertising Claims Litig.*, 882 F. Supp. 915, 927 (C.D.
6 Cal. 1994) (*quoting Max Daetwyler Corp. v. Input Graphics, Inc.*, 608 F. Supp. 1549, 1556 (ED.
7 Pa. 1985)). Canter’s claim fails to meet the requirements in several material respects.

8 First, Canter has failed to plead the allegedly offending advertisement (or advertisements)
9 in any detail whatsoever, let alone with any particularity. Rather, Canter generally complains
10 about the use of the term “updated” in connection with some unidentified advertising of a
11 Marygrove course (or courses) Teachscape was offering. Cmplt., ¶¶ 65-66. Canter, however,
12 does not attach or even quote in full any allegedly false advertising. This lack of specificity in
13 and of itself is fatal to Canter’s Lanham Act claim.

14 Second, not only is there no specific factual assertion made, there is no statement of fact
15 that reasonably would deceive the reader. Canter’s contention that the word “updated”
16 somehow deceptively states as a fact that Teachscape is responsible for the prior coursework
17 prepared by Canter, ignores the “fact” that the degree programs, whether offered by Teachscape
18 or Canter, are *Marygrove*’s degree programs. Hence, the “updated” reference is true as the more
19 recent program is newer or “updated”. Thus, Canter’s construction of the word “updated” as
20 false and misleading is unwarranted.

21 In all events, a mere statement that a course is “updated” is not a specific factual assertion
22 that can give rise to liability. *See, e.g., Cook, Perkiss & Liehe*, 911 F.2d at 245 (“The
23 advertisement does not contain the kind of detailed or specific factual assertions that are
24 necessary to state a false advertising cause of action under the [Lanham] Act.”); *Atari Corp. v.*
25 *3DO Co.*, 1994 WL 723601 (N.D. Cal. 1994) (holding the slogan “the most advanced home
26 gaming system in the universe” is a general assertion of superiority and ‘not the kind of detailed
27 or specific factual assertion’ that is required to state a false advertising cause of action under the
28 Lanham Act”) (internal citations omitted).

Indeed, at most, the vague reference to “updated”—albeit devoid of any context—falls squarely within the definition of unactionable “puffery.” *See Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc.*, 326 F.3d 687, 700 (6th Cir. 2003) (advertising a product as “redesigned and improved” not actionable.); *In re Century 21-RE/MAX Real Estate Advertising Claims Litig.*, 882 F. Supp. 915 (C.D. Cal. 1994) (holding the words “number one” and largest “volume” real estate company are too vague to be deceptive under the Lanham Act); *Summit Tech., Inc. v. High-Line Med. Instruments, Co.*, 933 F. Supp. 918 (C.D. Cal. 1996) (“The Court agrees that Hi-Line’s statement that the used Excimer lasers are ‘perfectly reliable’ is mere puffery, not actionable under the Lanham Act.”); *Pinnacle Sys., Inc. v. XOS Techs., Inc.*, 2003 WL 21397845, at *5 (N.D. Cal. May 19, 2003) (“A statement that XOS’s products are ‘inferior’ is vague, generalized, and just the sort of outrageous statement consumers expect in advertising”). As these cases demonstrate, use of the word “updated” is not actionable under the Lanham Act.

Finally, for much the same reason, even if the statement that the course was “updated” was some assertion of a detailed or specific fact (which it was not), such a statement as a matter of law is not the type that would be considered “material”, that is, one that would “likely to influence the purchasing decision.” *In re Century 21-RE/MAX Real Estate Advertising Claims Litig.*, 882 F. Supp. at 923. (quoting *Cook, supra*, 911 F.2d at 244).

In sum, Canter’s Lanham Act claim is devoid of merit. Teachscape’s motion should be granted.

D. The Dismissal Of The Copyright And Lanham Act Claims Warrants Dismissal Of The Entire Action.

Courts may decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1337(c)(3); *Burnett v. Twentieth Century Fox Film Corp.*, --- F. Supp. 2d ---, 2007 WL 1662343, at *10 (C.D. Cal. Jun. 4, 2007) (court dismissed state law claims after dismissing federal copyright and Lanham Act claims). The Ninth Circuit uses a two-part test to determine whether it is appropriate to decline supplemental jurisdiction. *Giannini v. Schering-Plough Corp.*, 2007 WL 1839789, *4 (N.D. Cal. Jun. 26, 2007). First, a court must look to whether it falls under one of the four

1 enumerated circumstances under 28 U.S.C. § 1337(c), which includes the dismissal of all claims
 2 over which the court has original jurisdiction; second, the court must consider whether the
 3 values of economy, convenience, fairness and comity will be served by exercising jurisdiction.
 4 *See Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997). “When the balance of
 5 [judicial economy, convenience, fairness and comity] indicate that a case properly belongs in
 6 state court, as when the federal claims have dropped out of the lawsuit in its early stages, the
 7 federal court should decline the exercise of jurisdiction.” *Executive Software North America, Inc. v. U.S. Dist. Ct.*, 24 F.3d 1545, 1552 (9th Cir. 1994).

9 Teachscape submits that under these enumerated factors, dismissal of the entire action is
 10 appropriate. Plaintiffs’ federal claims should be dismissed; this case is at the pleading stage; and
 11 Plaintiffs’ state claims should be brought in San Francisco County, where Teachscape is located,
 12 which would not disadvantage Canter, a Los Angeles corporation, and Laureate, a Maryland
 13 corporation. *See* Cmplt. ¶¶ 4, 5.

14 Should this Court, however, be inclined to further consider the state law claims asserted
 15 by Plaintiffs, dismissal with prejudice of the entire action is warranted in any event.

16 **E. Canter’s False Advertising Claim Under Bus. & Prof. Code Section
 17 17500 Fails As A Matter of Law.**

18 Canter’s false and misleading advertising claim under Bus. & Prof. Code § 17500 is
 19 predicated on the same factual allegations of its Lanham Act claim. For the same reasons that
 Canter’s Lanham Act claims fail, its Section 17500 claim also fails.

20 California’s false advertising law prohibits advertising property or services with untrue
 21 or misleading statements. *McCann v. Lucky Money, Inc.*, 129 Cal. App. 4th 1382, 1388 (2005).
 22 A statement is false or misleading if members of the public are *likely* to be deceived. *Id.*
 23 (emphasis added). The term “likely” means that the deception is probable, not merely possible.
 24 *Williams v. Gerber Products Co.*, 439 F. Supp. 2d 1112, 1117 (S.D. Cal. 2006). Consumer
 25 reliance is induced by specific rather than general assertions. *Id.* Advertising that merely states
 26 in general terms that one product is superior is not actionable. *Id.*

27 Here, as previously noted, there is nothing false or misleading in the description of
 28 Marygrove’s degree program as “updated”. Further, “updated” is simply too vague to be

1 actionable. *See Cook Perkiss & Liehe*, 911 F.2d at 245 (statement “we’re the low cost
 2 commercial collection experts” non-actionable puffery); *Consumer Advocates v. Echostar*
 3 *Satellite Corp.*, 113 Cal. App. 4th 1351, 1361 (2003) (advertisement that system provided
 4 “crystal clear picture” and “CD quality” sound found to be non-actionable puffery). Advertising
 5 something as “updated” is merely a “boast[], all-but-meaningless superlative[] … a claim which
 6 no reasonable consumer would take as anything more weighty than an advertising slogan.” *Id.*
 7 at 1361.

8 Indeed, even if one accepts Canter’s attenuated inference that by using the term
 9 “updated,” Teachscape falsely implied a long-term relationship with Marygrove (and one should
 10 not), Canter’s far-reaching interpretation is at best only “one possible interpretation,” and that it
 11 not the standard. *Williams*, 439 F. Supp. 2d at 1117. Rather, the standard is whether it is
 12 *probable* that a statement will deceive a reasonable consumer, not merely that it is possible. *Id.*
 13 Nothing about a vague reference to Marygrove’s degree program offering being “updated” could
 14 conceivably deceive a reasonable consumer about anything factual. Canter’s fourth claim for
 15 relief should therefore be dismissed.

16 **E. Canter’s Misappropriation Of Trade Secrets Claim Fails As A
 17 Matter Of Law.**

18 In order to establish a claim for misappropriation of trade secrets under the Uniform
 19 Trade Secret Act, a plaintiff must demonstrate that it owned a trade secret and that the defendant
 20 acquired, disclosed, or used the plaintiff’s trade secret through improper means. Cal. Civ. Code
 21 § 3426.1; *Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal. App. 4th 1658, 1665 (2003). Canter has
 22 failed to properly plead both of these requirements.

23 **1. The Materials Alleged Are Not “Trade Secrets.”**

24 A “trade secret” includes only information that “derives independent economic value,
 25 actual or potential, from not being generally known to the public or to other persons who can
 26 obtain economic value from its disclosure or use....” Cal. Civ. Code § 3426.1. To avoid a
 27 motion to dismiss, the plaintiff must allege *facts* showing the existence of a trade secret; an
 28 averment that the information is “secret” will not suffice. *Diodes, Inc. v. Franzen*, 260 Cal.
 App. 2d 244, 252 (1968). Thus, a party seeking to protect trade secrets must describe the subject

1 matter of the trade secret with sufficient particularity to separate it from matters of general
2 knowledge in the trade or of special knowledge of those persons who are skilled in the trade, and
3 to permit the defendant to ascertain at least the boundaries within which the secret lies. *Whyte v.*
4 *Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1453 (2002) (“new product information” was too
5 broad, as it does not differentiate between truly secret information, such as formulas and product
6 design, and new product information which had been publicly disclosed).

7 Market research does not enjoy blanket trade secret protection, particularly if it relates to
8 the needs of a buyer “that is presumably aware of its own needs.” *See id.* at 1456. Information
9 that is readily obtainable through public sources such as directories also does not derive the
10 independent economic value necessary to the existence of a trade secret. *Scott v. Snelling &*
11 *Snelling, Inc.*, 732 F. Supp. 1034, 1044 (N.D. Cal. 1990). Information which is not exclusive or
12 which is generally in use by good faith competitors also cannot be classified as a trade secret.
13 So, too, information that is discoverable to those in the industry is not a trade secret.
14 *AdvantaCare Health Partners, LP v. Access IV, Inc.*, 2003 WL 23883596, at *2 (N.D. Cal. Oct.
15 24, 2003). Moreover, information, including customer lists, that are based on an employee’s
16 personal knowledge and prior business contacts are not trade secrets. *Scott*, 732 F.Supp. at
17 1044. This reflects the public policy that an employee’s skill and knowledge of a particular
18 business constitute the means by which he earns a living and the courts should not hastily brand
19 them as confidential where this will deprive him of employment opportunities. *Rigging Int’l*
20 *Maint. Co. v. Gwin*, 128 Cal. App. 3d 594, 606-07 (1982).

21 Here, Canter boldly asserts that *all* information regarding its method “for identifying
22 appropriate markets for its products, information regarding market segmentation, design of
23 distance learning degree programs and methods for their accreditation, enrollment systems, and
24 specific customer contacts and preferences” are worthy of trade secret protective. Cmplt., ¶ 29.
25 Canter vaguely summarizes all of this information as “knowledge about lucrative markets.” *Id.*
26 ¶ 32. However, these conclusory allegations, in the context of the “products” being offered and
27 the “customers” at issue, as well as the alleged misappropriation, belie Canter’s contention.

28 As a preliminary matter, these purported “trade secrets” are not sufficiently pled so as to

1 separate them from matters of general knowledge in the trade of developing, marketing and
 2 providing graduate degree programs, and does not allow Teachscape, or anyone else, to ascertain
 3 the boundaries within which the “secret” lies. *See Whyte*, 101 Cal. App. 4th at 1453. For
 4 example, with respect to Canter’s “methodology for identifying appropriate markets for its
 5 programs” and “market segmentation,” Canter merely provides that is “invested years of market
 6 research and substantial financial resources into an analysis of the educational marketplace.”
 7 Cmplt., ¶ 10. Yet, Canter does not explain what may have been included in this analysis, nor
 8 does Canter provide Teachscape with any information that instructs Teachscape as to the
 9 boundaries of this alleged “methodology.” With respect to the assertion that Canter’s
 10 “design” of distance learning programs is a trade secret, Canter provides no information as to
 11 what it asserts is encompassed in this “design,” leaving Teachscape without an understanding of
 12 the boundaries of this alleged trade secret.

13 Even assuming that the purported trade secrets are sufficiently defined (which they are
 14 not), Canter’s claim ignores the fact that its “market” and “customers” are universities,
 15 “education partners” which can offer degrees. (Cmplt., ¶¶ 6, 10.) Tellingly, the relationship
 16 with the sole customer as to which Canter specifically complains, Marygrove College, is a
 17 matter of public record and even advertised by Plaintiffs (along with Plaintiffs’ other
 18 “relationships”) *on Plaintiffs’ own websites*. *See* RFJN, Exh. C. Thus, Canter’s conclusory
 19 allegation that its unspecified market research is entitled to trade secret protection is belied by
 20 Canter’s own market definition and publications, which show that the “market” is readily
 21 identifiable, available to anyone with an interest, and generally discoverable.

22 Thus, Canter suggestion that customer contacts are “trade secrets” is without merit.
 23 While Canter does not define what encompasses “customer contacts,” information such as the
 24 names, location, and telephone number of Canter’s educational partners is, again, readily
 25 available. *See* RFJN, Exhs. C, E.⁶ Even if this information were not publicly available, and it is,
 26

27 ⁶ For example, Canter’s website indicates that its educational partners include Laureate’s wholly
 28 owned affiliate Walden University, and third party institutions such as the University of New
 England, Olivet Nazarene University and Marygrove College. RFJN, Exh. C. Contact
 information for these educational providers can be found on their respective websites; indeed, on

1 customer information that is based on an employee's personal knowledge is not a trade secret.
 2 See *Rigging Internat.*, 128 Cal.App.3d at 606-07. Accordingly, Canter has not pled that its
 3 "knowledge about lucrative markets" is entitled to trade secret protection.

4 Critically, the sole identifiable complaint alleged by Canter is that Teachscape began a
 5 relationship for an online post-secondary degree program with Marygrove. Suggesting in its
 6 complaint that it partners with other universities for such online programs, Canter necessarily
 7 tethers its claim that this research into potential online partners has independent economic value
 8 to Canter. However, as Canter's own website demonstrates, Canter is abandoning all "partners"
 9 for online degree programs and instead opting to offer such online programs exclusively through
 10 Laureate's wholly owned subsidiary, Walden University. See RJFN, Exhs. B, D. This simple
 11 fact, of which judicial notice may be taken, shows that information regarding universities is a
 12 matter of public knowledge and that Plaintiffs supposed trade secrets regarding potential online
 13 customers, contacts and their supposed preferences, is of no independent economic value to
 14 Canter. Canter has failed to plead any protectable "trade secrets."

15 **2. Canter Did Not, And Cannot, Allege Any Improper Acquisition,
 16 Disclosure Or Use Of Canter's Purported "Trade Secrets."**

17 In order for a plaintiff to establish misappropriation of trade secrets, the plaintiff must
 18 allege that the defendant either acquired, disclosed or used the plaintiff's trade secret
 19 improperly. Cal. Civ. Code § 3426.1. "Improper means" includes theft, bribery,
 20 misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage
 21 through electronic or other means. *Id.* Mere solicitation of an employee to leave and associate
 22 with a competitor is not improper. *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d
 23 1324, 1337-38 (9th Cir. 1980). A motion to dismiss will be granted where the alleged actions
 24 leading to the misappropriation do not implicate the defendant. See *Globespan, Inc. v. O'Neill*,
 25 151 F. Supp. 2d 1229, 1235-36 (C.D. Cal. 2001).

26 Here, Canter's claim is predicated on the allegation that Teachscape "hired" or

27 the University of New England's website, a full directory of the university's personnel is
 28 available, which includes the name, contact information and title of each member of its staff.
 [www.une.edu/hr/pdf/personneldirectory.pdf.]

1 “contracted” with certain former Canter employees. Cmplt., ¶¶ 7, 32. Tellingly, while Plaintiffs
 2 allege these employees were bound by confidential agreements (unidentified and undefined),
 3 Plaintiffs do not allege (nor can they) that Teachscape wrongfully solicited these employees.
 4 *See Posdata Co. Ltd. v. Kim*, 2007 WL 1848661, at *7 (N.D. Cal. Jun. 27, 2007). Rather, it
 5 merely suggests, without any factual support, that because certain of its former employees work
 6 (or worked) for Teachscape, these employees must have breached some unspecified
 7 confidentiality agreement with Canter. Cmplt. ¶¶ 31, 32.⁷ However, the suggestion
 8 demonstrates that Canter’s claim is entirely predicated on the “inevitable disclosure doctrine.”
 9 Yet, this doctrine—which would allow plaintiff to plead a trade secret misappropriation claim
 10 by simply demonstrating the defendant’s new employment will inevitably lead him to rely on
 11 the plaintiff’s trade secrets—has been soundly rejected in California. *Whyte*, 101 Cal. App. 4th
 12 at 1458, 1461-62; *Globespan*, 151 F. Supp. 2d at 1235; *Bayer Corp. v. Roche Molecular Syst., Inc.*, 72 F. Supp. 2d 1111, 1120 (N.D. Cal. 1999).

14 There are no properly alleged *facts* to support Canter’s misappropriation of trade secrets.
 15 Teachscape’s motion should be granted.

16 **F. Canter’s Claim For Intentional Interference With Prospective
 17 Economic Advantage Claim Fails As A Matter of Law.**

18 To support a cause of action for interference with prospective economic advantage, a
 19 plaintiff must plead and prove: “(1) the existence of a specific economic relationship between
 20 [plaintiff] and third parties that may economically benefit [plaintiff]; (2) knowledge by the
 21 [defendants] of this relationship; (3) intentional acts by the [defendants] designed to disrupt the
 22 relationship; (4) actual disruption of the relationship; and (5) damages to the [plaintiff].” *Silicon
 23 Knights*, 983 F. Supp. at 1310 (quoting *Rickards v. Canine Eye Registration Found., Inc.*, 704
 24 F.2d 1449, 1456 (9th Cir. 1983)). The California Supreme Court has also stated that a plaintiff
 25 seeking to recover for alleged interference with prospective economic relations has the burden of
 26 pleading and proving that the defendant’s interference was wrongful “by some measure beyond

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 28 ⁷ While Canter makes vague and wholly unsubstantiated claims that Teachcape “overnight”
 entered the market, the only “facts” alleged shows that it was more than *two years* after Canter’s
 employees first left that Teachscape first actually offered any program with Marygrove.

1 the fact of the interference itself.” *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th
 2 376, 392 (1995).

3 Moreover, the law precludes recovery for overly speculative expectancies by initially
 4 requiring proof that the business relationship contained the *probability* of a future economic
 5 relationship. *Silicon Knights*, 983 F. Supp. at 1311. Where a party fails to specifically identify
 6 the “third parties” with which it had prospective contractual relationships, courts will dismiss the
 7 claim. *See Tele Atlas N.V. v. Navteq Corp.*, 397 F. Supp. 2d 1184, 1194 (N.D. Cal. 2005)
 8 (plaintiff vaguely alleged that defendant interfered with prospective contractual relationships
 9 with “third parties”); *see also Silicon Knights*, 983 F. Supp. at 1312 (claim that “[d]efendants
 10 induced and/or caused customers and potential customers not to purchase ... products ... from
 11 Silicon Knights” dismissed.)

12 Here, Canter vaguely claims that it maintains prospective client relationships with a
 13 “number of educational institutions,” but fails to identify any specific prospective relationship
 14 with which Teachscape allegedly interfered. By doing so, Canter effectively deprives
 15 Teachscape of minimal notice of the scope of Canter’s claim. Indeed, Canter admits as much
 16 when it alleges that Teachscape “knew *or had reason to know* of Canter’s relationships with its
 17 [educational] partners.” Cmplt., ¶ 40 (emphasis added). Teachscape does not know what Canter
 18 thinks it should know.

19 Further, when one strips Plaintiffs’ complaint of its unwarranted factual and legal
 20 conclusions and inferences, it becomes evident that Canter is really complaining about the
 21 alleged interference itself.⁸ This, however, is not actionable. *See Hsu v. OZ Optics, Ltd.*, 211
 22 F.R.D. 615, 620-21 (N.D. Cal. 2002); *Della Penna*, 11 Cal. 4th at 393 (1995). Where, as here,
 23 the sole action plaintiff alleges defendant committed is directing a customer to reject entering

24

25 ⁸ As previously noted, while Canter alleges that Teachscape “used Canter confidential
 26 information about its relationships with its business partners to gain an unlawful advantage and
 27 to induce at least one of Canter’s existing partners to reject a Canter program and to replace it
 28 with a substantially similar program offered by Teachscape” (Cmplt., ¶ 41), Canter does not
 allege any *facts* that identify any “confidential information” or how it was allegedly used to gain
 an alleged “unlawful” advantage in some wrongful manner. That Marygrove offers graduate
 degree programs, was not a secret.

1 into a relationship with the plaintiff, a claim for interference with prospective economic
 2 advantage should be dismissed. *City of Oakland v. Comcast Corp.*, 2007 WL 518868, at *8
 3 (N.D. Cal. Feb. 14, 2007) (only action City alleged is that Comcast directed third party to reject
 4 franchise renewal ordinance with City).

5 **G. Canter's Intentional Interference With Contract Claim Fails.**

6 To establish a claim for intentional interference with contract, the plaintiff must plead:
 7 (1) the defendant's intentional acts designed to induce a breach or disruption of a valid
 8 contractual relationship; (2) actual breach or disruption of the contractual relationship; and (3)
 9 resulting damage. *Reeves v. Hanlon*, 33 Cal.4th 1140, 1148 (2004). Canter has failed to
 10 sufficiently plead any of these requirements.

11 As to the first element, plaintiff must allege the defendant's knowledge that the
 12 interference was certain or substantially certain to occur as a result of his or her action. See
 13 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1157 (2003); *Quelimane Co. v.*
 14 *Stewart Title Guar. Co.*, 19 Cal. 4th 26, 56 (1998). Here, not only does Canter fail to plead *facts*
 15 to suggest that Teachscape intentionally induced breach or disruption of any contractual
 16 relationship, Canter actually pleads facts to show that Teachscape was *not* aware that
 17 Marygrove's offering of a CIA degree through Teachscape would violate any terms of a
 18 Marygrove/Teachscape contract. Indeed, once Canter raised the issue with Teachscape, the
 19 offering was withdrawn. Cmplt., ¶ 21. While Canter would suggest the withdrawal of the
 20 offering infers an admission of guilty, the only basis for asserting this contrary inference is
 21 Canter's suggestion that since its former employees knew of the contract, Teachscape must have
 22 known about the contract too. But again, this allegation, based on the "inevitable disclosure"
 23 doctrine, cannot salvage Canter's otherwise unsupportable claim.

24 Equally fatal to Canter's claim is that it alleges, upon information and belief, that
 25 Marygrove "does not intend to renew its contract for the provision of the CIA degree with
 26 Canter." Cmplt., ¶ 60. A decision not to renew does not give rise to a claim for interference
 27 with an existing contract. *Pacific Oxygen Sales Co. v. Union Carbide Corp.*, 930 F.2d 28, 1991
 28 WL 42150, at *2 (9th Cir. Mar. 21, 1991).

1 To the extent Canter also alleges that Teachscape induced Marygrove to attach
 2 “unacceptable conditions” to an offer to Canter for Math and Reading degree programs, these
 3 allegations amount to nothing more than conclusions without any factual support and cannot
 4 support a claim.

5 Finally, Canter fails to properly plead it suffered damages as a result of Teachscape’s
 6 alleged interference under Rule 8(a) pleading requirements. Canter conclusorily alleges that
 7 Teachscape’s interference with a contractual relationship has “damaged” it. Cmplt. ¶ 61.
 8 Conclusory claims of damages with no factual predicate on which to support the allegation are
 9 insufficient. *See Silicon Knights*, 983 F. Supp. at 1310. Here, Canter did not (and based on its
 10 announced intention to provide online degree programs exclusively through its subsidiary
 11 university cannot in good faith) claim that but-for Teachscape’s purported interference, it would
 12 have accepted the terms Marygrove offered for its Math and Reading program, and similarly,
 13 would have secured an extension of the existing online CIA degree program. As such, it has
 14 plead no valid claim of damages. Consequently, Canter’s third claim should be dismissed.

15 **H. Plaintiffs’ Unfair Competition Claim Must Be Dismissed.**

16 A plaintiff alleging unfair business practices under the unfair competition statutes must
 17 state with reasonable particularity the facts supporting the statutory elements of the violation.
 18 *Silicon Knights*, 983 F. Supp. at 1316. Further, “[w]here the UCL plaintiff alleges that the
 19 defendant (who is a competitor) has committed an ‘unfair’ act or practice, the test of whether the
 20 UCL’s ‘unfair’ prong has been satisfied is whether the ‘conduct that threatens an incipient
 21 violation of an antitrust law, or violates the policy or spirit of one of those laws because its
 22 effects are comparable to or the same as a violation of the law, or otherwise significantly
 23 threatens or harms competition.’” *Paulus v. Bob Lynch Ford, Inc.*, 139 Cal. App. 4th 659, 679
 24 (2006) (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th
 25 163, 187 (1999)). Where the facts as pled do not state a claim that because of the wrongful
 26 conduct of the defendant, plaintiff suffered a substantial, unavoidable injury, dismissal is
 27 warranted. *Berryman v. Merit Property Mgmt. Inc.*, 62 Cal. Rptr. 3d 177, 2007 WL 1567050, at
 28 *7 (Cal. App. May 31, 2007).

1 Here, Plaintiffs claim that Teachscape's acts of unfair competition were its "efforts to
 2 misappropriate and use Canter's confidential" information and its engaging in "untrue or
 3 misleading advertising." Cmplt., ¶¶ 32, 41, 53, 65. As demonstrated above, Plaintiffs' claim of
 4 misappropriation of confidential information and false advertising fail as a matter of law and
 5 provide no support for any unfair competition claim.⁹ Plaintiffs also conclusorily allege that
 6 Teachscape's actions are "immoral and unscrupulous and have been undertaken in violation of
 7 policies established in the California Civil Code and California Labor Code." Cmplt., ¶¶ 70-72.
 8 This conclusory allegations, wholly lacking in any factual specificity, provide no support for this
 9 claim. *See Silicon Knights*, 983 F.Supp. at 1316. Plaintiffs' unfair competition claim must be
 10 dismissed.

11 **I. Plaintiffs' Claim for "Restitution" Under Bus. & Prof. Code Section
 12 17200 and 17500 Should be Stricken.**

13 Even if Plaintiffs' had some viable claim under Section 17200 or 17500, which they do
 14 not, they are not entitled to the monetary relief they seek. Restitution under Section 17500 and
 15 17200 is the "return money obtained through an unfair business practice to those persons in
 16 interest from whom the property was taken." *Korea Supply*, 29 Cal. 4th at 1149.
 17 "Compensation for a lost business opportunity is a measure of damages and not restitution to the
 18 alleged victims." *Id.* at 1151 (quoting *MAI Systems Corp. v. UIPS*, 856 F.Supp. 538, 542
 19 (N.D.Cal. 1994)). Thus, "disgorgement is not an available remedy." *Madrid v. Perot Syst.*
 20 *Corp.*, 130 Cal. App. 4th 440, 460 (2005).

21 Here, Plaintiffs' claim to be "entitled to restitution for the benefits improperly garnered
 22 by Teachscape..." and for disgorgement of all "ill-gotten profits." Cmplt. ¶ 68. Clearly, such
 23 relief is not recoverable under either Section 17200 or Section 17500. These claims for relief
 24 should be stricken.

25
 26 ⁹ To the extent Plaintiffs' claim is based upon on the same nucleus of facts as the plaintiff's
 27 claim for misappropriation for trade secrets, it is preempted. *See Cal. Civ. Code § 3426.7;*
Softchoice Corp. v. EnPointe Techs., Inc., 2006 WL 3350798, at *1 (Cal. Sup. Nov. 13, 2006);
Ernst Paper Prods. Inc. v. Mobil Chem. Co., 1997 WL 33483520, at *7 (C.D. Cal. Dec. 2,
 28 1997).

1 V. CONCLUSION

2 At its core, the present action represents nothing more than the legal equivalent of "shoot
3 first, ask questions later" mentality. The "shot": this incredibly expansive action asserting
4 unfounded claims of copyright infringement, misappropriation of trade secrets, unfair
5 competition and interference with business relationship. The way to "ask questions later":
6 Intrusive, unwarranted, distracting and expensive discovery. Not surprisingly, well-settled case
7 law holds that this approach to litigation will not be tolerated.

8 Teachscape's motion to dismiss is well-founded on both the law and the undisputed
9 properly pleaded facts. Teachscape respectfully submits its motion should be granted.

10 Dated: August 3, 2007

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12 By 13 GAYLE M. ATHANACIO
14 Attorney for Defendant Teachscape, Inc.

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